

NCD1KUSC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 MARK KUSHNEIR,

4 Plaintiff,

5 v.

14 Civ. 9148 (JLR)

6 THE CITY OF NEW YORK, *et al.*,

7 Defendants.

Conference

-----x

8 New York, N.Y.

9 December 13, 2023

11:15 a.m.

10 Before:

11 HON. JENNIFER L. ROCHON,

12 District Judge

13 APPEARANCES

14 GIDEON O. OLIVER, ESQ.

15 Attorney for Plaintiff

16 COHEN&GREEN P.L.L.C.

Attorneys for Plaintiff

17 BY: J. REMY GREEN, ESQ.

18 NEW YORK CITY LAW DEPARTMENT

OFFICE OF THE CORPORATION COUNSEL

Attorneys for Defendants

19 BY: HANNAH V. FADDIS, ESQ.

JOSEPH A. RUSSO, ESQ.

20 Assistant Corporation Counsel

21 ALSO PRESENT: REGINA YU, Law Clerk (Plaintiff)

NCD1KUSC

1 correct, Ms. Faddis?

2 MS. FADDIS: Yes, your Honor.

3 THE COURT: Thank you. So if a defendant doesn't open  
4 the door, plaintiff is precluded from eliciting testimony  
5 regarding indemnification.

6 The next item from plaintiff is the Court should not  
7 give a nominal damages instruction because the plaintiff is not  
8 requesting one. Can I have some argument from you, Mr. Oliver,  
9 or Mx. Green, if there's anything you'd like to add to your  
10 papers. I do have quite a bit, but if there's anything you  
11 need.

12 MR. OLIVER: I don't think so, your Honor. I would  
13 add the last trial that opposing counsel and I did together,  
14 the same issue came up in front of Judge Wood and Judge Wood  
15 did not give a nominal damages instruction. I'm not sure I  
16 mentioned that in the papers. Beyond that, I think I'll rely  
17 on the papers.

18 THE COURT: Okay. And it's your position that nominal  
19 damages are appropriate in this case, you just are  
20 strategically not choosing to request nominal damages; is that  
21 correct?

22 MR. OLIVER: I'm not sure they are appropriate in this  
23 case, but strategically, we are requesting that they not be  
24 added. Yes.

25 THE COURT: Ms. Faddis, anything you want to add to

NCD1KUSC

1 your papers, including the recent Judge Wood case?

2 MS. FADDIS: No, your Honor. I will say off the top  
3 of my head I know we have had cases on the other side where the  
4 courts have given a nominal damages instruction over  
5 plaintiff's objection. A case doesn't come to mind, but I know  
6 it's happened. So it does go both ways. I don't think I have  
7 anything else to say in addition to our papers at this point.

8 THE COURT: Okay. Thank you.

9 At this point I am going to give a nominal damages  
10 charge, and let me explain a little bit more.

11 The defendant opposes the motion *in limine* and argues  
12 that nominal damages must be awarded where the plaintiff proves  
13 there's a violation of a constitutional right but has not  
14 proven any compensatory damages. And plaintiff, from the  
15 papers, is not suggesting that nominal damages can't be awarded  
16 for a false arrest claim, and indeed says "a nominal damages  
17 charge is available for plaintiffs for their benefit." But  
18 instead the plaintiff is asking the Court to exclude the charge  
19 at plaintiff's option so that the jury does not compromise an  
20 award of nominal damages.

21 I agree with the defendant that it would not  
22 adequately inform the jury of the law if a nominal damages  
23 charge was omitted. I am not persuaded by plaintiff's reliance  
24 on—and sole reliance on—*Vilkhu v. City of New York*, 2009 WL  
25 537495 (E.D.N.Y. March 3, 2009) for the proposition that

NCD1KUSC

1 plaintiff can strategically elect to remove the option of  
2 nominal damages from the jury's consideration to avoid the risk  
3 of a compromised verdict by the jury. And insofar as *Vilkhu*  
4 stands for such a proposition, I disagree with it. The court  
5 is obligated to present a jury charge that "adequately informs  
6 the jury as to the correct legal standard." *Norville v. Staten*  
7 *Island University Hospital*, 196 F.3d 89, 100 (2d Cir. 1999).  
8 "If a jury finds that a constitutional violation has been  
9 proven but that the plaintiff has not shown injury sufficient  
10 to warrant award of compensatory damages, it is plain error to  
11 instruct the jury merely that, having found a violation, it may  
12 [rather than must] award nominal damages." *Robinson v.*  
13 *Cattaraugus County*, 147 F.3d at 162. Indeed, in *Robinson*, the  
14 Second Circuit held that it was plain error for the district  
15 court to charge that the jury may, rather than must, award  
16 nominal damages, even though the plaintiff had not even  
17 objected to the charge. Again, plaintiff is not arguing that  
18 nominal damages cannot be awarded for false arrest or for the  
19 false arrest here and instead argues that he should have the  
20 strategic choice to take it off the table and take off the  
21 table the jury's option to award such damages so that it is  
22 discouraged from compromising in its verdict. The Court will  
23 always presume that the jury will follow the law as charged.  
24 *CSX Transportation, Inc. v. Hensley*, 129 S. Ct. 2139 (2009).  
25 Therefore, the Court will charge the jury on proximate cause

NCD1KUSC

1 and compensatory damages, including that loss of liberty is a  
2 compensable damage for false arrest. *Kerman v. City of New*  
3 *York*, 374 F.3d 93, 132 (2d Cir. 2004). Should the jury find  
4 that plaintiff suffered compensable damages that were  
5 proximately caused by a constitutional violation, they will be  
6 instructed on awarding damages and can certainly do so,  
7 including damages related to a loss of liberty. However,  
8 omitting a nominal damages charge if the jury finds that  
9 plaintiff has not suffered compensable damages in order to  
10 steer the jury away from an award of nominal damages, as  
11 plaintiff seems to be suggesting, would be misleading to the  
12 jury as to the state of the law. As the court stated in  
13 *Randolph v. Metropolitan Transit Authority*, 2019 WL 1567663, at  
14 \*10 (S.D.N.Y. Apr. 11, 2019), in rejecting the argument that a  
15 nominal damages charge should not have been given, the court  
16 stated, this may give "the jury a false signal regarding the  
17 impact of their verdict on a plaintiff's right and force them  
18 wrongly to conclude that they had to make an award of  
19 compensatory damages, even where the evidence did not warrant  
20 one." The Second Circuit's summary affirmance of *Vilkhu* for  
21 "substantially the reasons" set forth by the district court in  
22 *Vilkhu v. City of New York*, 372 F. App'x 222, 223 (2d Cir.  
23 Apr. 21, 2010) does not provide contrary guidance because the  
24 district court presented multiple grounds in support of  
25 rejecting the objection for failure to present a nominal

NCD1KUSC

1 damages charge, including that the defendants were not  
2 prejudiced by the missing instruction, given the high actual  
3 damages awarded. Therefore, that summary affirmance does not  
4 persuade the Court otherwise or require the Court to hold  
5 otherwise. Therefore, at this point I will include a nominal  
6 damages charge in the jury charge. I will think more about it  
7 after I hear all of the evidence that comes in at trial to make  
8 sure that that instruction is still appropriate after the  
9 evidence has come in, but I'm not going to foreclose it based  
10 on a choice at this point.

11 Any questions, Mr. Oliver?

12 MR. OLIVER: No question. Just an objection on the  
13 record.

14 THE COURT: Sure.

15 MR. OLIVER: Thank you.

16 THE COURT: Yes. Absolutely. Objection is noted.

17 Anything else, Ms. Faddis?

18 MS. FADDIS: No, your Honor. Thank you.

19 THE COURT: Thank you.

20 The next motion *in limine* from the plaintiff is that  
21 defendants should not be allowed to introduce evidence contrary  
22 to the city's 30(b)(6) testimony. I am not sure that I can  
23 rule on this. I don't know what testimony is being sought to  
24 preclude. I will say that if any witness is providing  
25 testimony that varies from their deposition testimony, their